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CHARLES ELMORE

Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and

DAVID KRAKOWER alias
DAN KRAMER alias
PETER KRAKAUER alias
ABE GOLDSTEIN

Petitioners

against

THE PEOPLE OF THE STATE OF
NEW YORK

Respondent

RESPONDENT'S MEMORANDUM

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

CHARLES W. MANNING
WILLIAM HOPPEN
Deputy Assistant District Attorneys

of counsel

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Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and

DAVID KRAKOWER alias
DAN KRAMER alias
PETER KRAKAUER alias
ABE GOLDSTEIN

Petitioners

against

THE PEOPLE OF THE STATE OF
NEW YORK

Respondent

RESPONDENT'S MEMORANDUM

Statement

On March 8, 1947, petitioners Stemmer and Krakower were convicted in the Court of General Sessions, New York County, of Conspiracy and of Bribery of Participants in Professional Games (record 919-21;* New York Penal Law §§382, 580, subds. 1, 6, appendix 1-2).

* "Record" indicates a page reference to the record, as here filed, of the proceedings below.

On April 2 each was given a suspended sentence for the conspiracy, and sentenced to prison for five to ten years on the bribery (record 955-6). On February 24, 1948, the judgments were unanimously affirmed by the Appellate Division of the New York Supreme Court [record 963-4; 273 App. Div. 854, 77 N. Y. Supp. (2d) 261]. On November 24 they were similarly affirmed by the New York Court of Appeals [record 973-4; 298 N. Y. 728, 83 N. E. (2d) 141]. The State courts, while mentioning a particular State decision as the basis for judgment, rendered no formal opinion [record 971, 973-4; see *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15, 68 N. E. (2d) 854]. Petitioners seek certiorari under §1257 (3) of the Judicial Code [Stemmer p. 3, Krakower p. 1; 28 U. S. C. (1948) §1257 (3), appendix 2].

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Introduction

This case involves a ring of professional bookmakers and gamblers in New York City who conspired to "fix" a championship football playoff between the New York Giants and the Chicago Bears by bribing two of the Giant players to "throw" the game. Through certain telephone conversations among them, which police intercepted by authority of three court orders, the plot was discovered and the ring disrupted before the game. Four of the conspirators were identified and arrested. One of them, Alvin Paris, was convicted first in a separate trial. Corroborated by evidence of the intercepted phone conversations, he then testified against the other three, who were also convicted. Of the 16 or 17 phone conversations which were received in evidence, four were interstate, four were intrastate, and the others were of a nature impossible to determine. Two of the conspirators, petitioners Stemmer and Krakower, appealed. The third, Jerry Zarowitz, did not. Petitioners raise no question of due process. Their only claim here, one specifically considered by the New York Court of Appeals, is that the trial court was foreclosed by the Federal Communications Act from receiving the conversations in evidence [Stemmer pp. 4-9, Krakower pp. 5-6, 9-14; see record 548-9, 973-4; 47 U. S. C. (1946) §605, appendix 3].

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State Proceedings

On December 2, 1946, in New York City, Lieutenant Arthur L. Morgan of the Manhattan West Borough Headquarters Squad of the New York Police Department went before the Honorable Denis O'L. Cohalan, a Justice of the New York Supreme Court (order Dec. 2, appendix 9-10). Pursuant to the provisions of Article I, Section 12 of the New York State Constitution, and Section 813-a of the New York Code of Criminal Procedure, the officer filed an affidavit with the Court, requesting permission to intercept all telephone calls coming over a certain phone then being used in the commission of crime (affidavit Dec. 2, appendix 6-8, see *id.* 24-25). On this date the court granted the first of the three interception orders (order Dec. 2, appendix 9-10). About a week later, in similar proceedings instituted by another officer, a second Justice granted the two other orders (orders Dec. 10, appendix 14-15, 19-20; see affidavits Dec. 10, appendix 11-13, 16-18).

In 1892, the New York Legislature passed the predecessor to the existing provision of the New York Penal Law, which made the interception of any telephone communication in the state a crime punishable by two years' imprisonment (New York Penal Law §1423, subd. 6, appendix 21; see New York Laws 1892, c. 372; *id.* 1911, c. 316; *cf.* appendix 28, 40). In 1938, however, after discussion of the threat of organized urban crime, a New

York Constitutional Convention proposed the instant crime detection interception provision (convention 827,* see *id.* 369-374, 428-429, 430, 431-432, 479, 498-501, 503, 541-542, 543; appendix 22-23; *cf. id.* 26, 28, 30, 35-36). This provision was subsequently adopted by the people of the State in a general election, and is presently embodied in Section 12 of Article I of the New York Constitution (appendix 24; see New York Consol. Laws, Book 2 (McKinney 1939) p. 98, appendix 23; *cf. id.* 28, 30, 35-37, 40, 46).

This constitutional provision authorizes the use of telephone interceptions by State law enforcement officers under a system of judicial supervision through the issuance of warrants or ex parte court orders (New York Constitution, Art. I, Sec. 12, appendix 24; see affidavits and orders Dec. 2, 10, appendix 5-20; *cf. id.* 34-38, 41, 43, 44, 46). This provision is drawn with limitations against abuse analogous to those surrounding the issuance of warrants under the search and seizure guarantees of the Fourth Amendment to the Constitution of the United States (compare New York Constitution, Art. I, Sec. 12, appendix 24 with United States Constitution, Amend. IV, appendix 4; see also New York Constitution, Art. 1, Sec. 12, New York Civil Rights Law §8, appendix 4; *cf. id.* 35, 41, 45).

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* "Convention" refers either to pages or, where indicated, to documents in the record of the State Constitutional Convention. Citations are to the *Revised Record of the New York State Constitutional Convention* (1938).

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In 1942 the New York Legislature implemented this constitutional provision by the addition of Section 813-a to the Code of Criminal Procedure, defining the procedural steps which State officers are required to follow in order to obtain such judicial permission to intercept (appendix 25; see New York Laws 1942, c. 924; affidavits and orders Dec. 2, 10, appendix 5-20).

Applications for interception orders may be made only by a limited number of such officers, including the attorney general, a district attorney, or a police officer above the rank of sergeant, and must be based on the officer's oath or affirmation (New York Code Crim. Proc. §813-a, appendix 25; see affidavits Dec. 2, 10, appendix 6-8, 11-13, 16-18; New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf. id.* 40-41, 46).

The officer must apply to one of a group of judges sitting in various courts of record throughout the State, including the Court of General Sessions, a County Court, or the New York Supreme Court (New York Code Crim. Proc. §813-a, appendix 25; see affidavits and orders, Dec. 2, 10, appendix 5-6, 9-10, 11, 14-15, 16, 19-20; *cf. id.* 34-35, 41, 46).

The telephone line to be intercepted, the person or persons using it, and the purpose of the interception, must be particularly described (New York Code Crim. Proc. §813-a, appendix 25; see affidavits and orders Dec. 2, 10, appendix 6-7, 9-10, 12-15, 17, 19-20; New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf. id.* 28).

The judge may examine the officer, or other witnesses, under oath, and shall issue the order only if satisfied as to reasonable grounds (New York Code Crim. Proc. §813-a, appendix 25; see New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf.* orders Dec. 2, 10, appendix 9, 14, 19; also *id.* 40-42).

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Federal Law

The United States Government has never had a comparable telephone interception procedure. In 1937, in *Nardone* v. *United States,* 302 U. S. 379, the Court held that Congress, by its passage in 1934 of section 605 of the Federal Communications Act, had forbidden entirely the use of such interceptions by federal officers [see *Nardone* case, 302 U. S. at pp. 381-384, Cases Distinguished, appendix 48; also 48 Stat. (1934) 1064, 1103-1104, 47 U. S. C. (1946) §605; appendix 3].

During the years which followed, a number of unsuccessful measures were proposed to change this rule as to federal officers, debate on which measures showed Congress' awareness of the different interception policy adopted by New York State [83 Cong. Rec. (1938) 9453, 86 Cong. Rec. (1940) 9948-9949, 88 Cong. Rec. (1942) 4599, appendix 26-30; see S. 3756 (75th Cong. 3d Sess. 1938), H. J. Res. 571 (76th Cong. 3d Sess. 1940), H. J. Res. 310 (77th Cong. 2d Sess. 1942), appendix 26, 28, 30, and other measures cited *id.* 27, 29, 30].

In 1940 Congress undertook an investigation of all interceptions, including those used in State crime detection, to determine whether or not such practices called for remedial legislation [86 Cong. Rec. (1940) 3116; see S. Res. 224 (76th Cong. 3d Sess. 1940), appendix 31; S. Rept. 1304 (76th Cong. 3d Sess. 1940) pp. 1, 7, appendix 32-33; also 86 Cong. Rec. (1940) 889-890, 2693; *cf.* appendix 42].

A subcommittee held extended hearings, the New York practice was considered, and Congress took no action (hearing 240-241,* 648-650, 659-661, 817-819, appendix 33-46).

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* "Hearing" refers to pages in the record of proceedings before the subcommittee of the Senate Committee on Interstate Commerce which investigated State interceptions. Citations are to *United States Wire Tapping Investigation, Senate Hearings* (S. Res. 224, 76th Cong., U. S. Gov't Printing Office 1940-1941).

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POINT I

Certiorari should be denied.

Petitioners claim that the court improperly received the evidence (Stemmer pp. 4-9, Krakower pp. 5-6, 9-14). This is without basis. The interceptions were properly made under State law, and the federal act is without application [see Federal Law *supra* pp. 9-10; *cf.* affidavits and orders Dec. 2, 10, appendix 5-20; New York Penal Law §1423, subd. 6, appendix 21; New York Constitution, Art. 1, Sec. 12, appendix 24; New York Code Crim. Proc. §813-a, appendix 25; State Proceedings *supra* pp. 5-8; also *Leon* v. *State* (1942) 180 Md. 279, 284, 23 Atl. (2d) 706, 709, *cert. den. sub nom. Neal* v. *Maryland*, 316 U. S. 680; Law and Cases, appendix 47].

Certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

CHARLES W. MANNING
WILLIAM HOPPEN
Deputy Assistant District Attorneys

of counsel

March 1949

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APPENDIX

Statutes authorizing conviction

NEW YORK PENAL LAW

*§382. Bribery of participants in professional * * * games * * **

Whoever gives, promises or offers to any professional or amateur baseball, football, hockey, polo, tennis or basketball player or boxer or any player who participates or expects to participate in any professional or amateur game or sport or any jockey, driver, groom or any person participating or expecting to participate in any horse race, including owners of race tracks and their employees, stewards, trainers, judges, starters or special policemen, or to any manager, coach or trainer of any team or participant or prospective participant in any such game, contest or sport, any valuable thing with intent to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in a baseball, football, hockey or basketball game, boxing, tennis or polo match or a horse race or any professional or amateur sport, or game, in which such player or participant or jockey or driver, is taking part or expects to take part, or has any duty or connection therewith, or who, being a professional or amateur baseball, football, hockey, basketball, tennis or polo player, boxer, or jockey, driver, or groom or participant or prospective participant in any sport or game or a manager, coach or trainer of any team or individual participant or prospective participant in any such game, contest or sport, solicits or accepts any valuable thing to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in a baseball, football, hockey or basketball game or boxing, tennis or polo match, or horse race or any game or sport in which he is taking part, or expects to take part, or has any duty or connection therewith, is guilty of a felony, punishable by imprisonment for not less than one year, nor more than five years and by a fine of not more than ten thousand dollars. (*New York Laws 1945, c. 602*)

NEW YORK PENAL LAW

§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

• • •

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor.

Statutes invoked for certiorari

UNITED STATES CODE
JUDICIARY AND JUDICIAL PROCEDURE

§1257. State courts • • • certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. [*28 U. S. C. (1948) §1257 (3)*]

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FEDERAL COMMUNICATIONS ACT

§605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [*48 Stat. (1934) 1064, 1103-1104, 47 U. S. C. (1946) §605*]

Searches and seizures

UNITED STATES CONSTITUTION

[*Amendment IV—Searches and Seizures*]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE I OF THE NEW YORK CONSTITUTION

§12. [*Security against unreasonable searches, seizures* • • •]*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

• • •

NEW YORK CIVIL RIGHTS LAW

§8. *Right of search and seizure*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* For the interception part of this Section, see A24.

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A5

Telephone interceptions*

State Proceedings

SUPREME COURT—NEW YORK COUNTY

IN THE MATTER

of

INTERCEPTING TELEPHONE

COMMUNICATIONS

AFFIDAVIT AND ORDER

Legal Bureau

POLICE DEPARTMENT, NEW YORK CITY

240 Centre Street

New York City

---

* Material in the balance of this appendix follows the arrangement in the text of the brief.

INTERCEPTION ORDER OF DECEMBER 2

Affidavit

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-8020

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

ARTHUR L. MORGAN, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

That deponent has been informed by persons in a position to know, and whom he believes to be telling the truth, that one, Sid Paris and other persons whose names are unknown to informants and deponent, are engaged in the

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illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a Private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and bearing the number Circle 5-8020.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-8020, he will be able to obtain information against the said Sid Paris and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over the telephone instrument Circle 5-8020, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) Arthur L. Morgan

Sworn to before me this
2nd day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

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Order

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-8020

Acting Lieutenant Arthur L. Morgan, assigned to Borough Headquarters Squad Manhattan West of the Police Department of the City of New York, being now present before me and it appearing from his affidavit sworn to on the 2nd day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and that the ends of justice will be best served by authorizing the interception of messages; it is

ORDERED, that the Police Commissioner of the City of New York or his duly authorized agents be, and they hereby are authorized and empowered to intercept, listen

to, overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events; and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be and they hereby are authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-8020, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 2nd day of June, 1947.

Dated: City and County of New York,
December 2nd, 1946.

(signed) D O'L C.
Justice of the Supreme Court
of the State of New York.
DENIS O'L COHALAN

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FIRST INTERCEPTION ORDER OF DECEMBER 10

Affidavit

SUPREME COURT — NEW YORK COUNTY

In the Matter
of
Intercepting Telephone Communications
Being Transmitted Over
Circle 5-7366

State of New York }
County of New York } ss.:

George W. McGirr, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

That deponent has been informed by persons in a position to know and whom he believes to be telling the truth, that "SID" and "MATTY," whose full names are unknown, and other persons whose names are unknown to informants and deponent, are engaged in the illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and bearing the number Circle 5-7366.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-7366, he will be able to obtain information against the said "SID" and "MATTY," and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over telephone instrument Circle 5-7366, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument

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bearing the number Circle 5-7366, located at 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) George W. McGirr

Sworn to before me this
10th day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

Order

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-7366

Acting Lieutenant George W. McGirr, assigned to Borough Headquarters Squad, Manhattan West, of the Police Department of the City of New York, being now present before me and it appearing from his affidavit sworn to on the 10th day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing the number Circle 5-7366, located at premises 56 West 56th Street, Borough of Manhattan, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and that the ends of justice will be best served by authorizing the interception of messages; it is

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ORDERED, that the Police Commissioner of the City of New York, or his duly authorized agents be, and they hereby are authorized and empowered to intercept, listen to, overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-7366, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events, and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be and they hereby are authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-7366, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 10th day of February, 1947.

Dated: City and County of New York,
December 10th, 1946.

(signed) Samuel Null
Justice of the Supreme Court
of the State of New York.

SAMUEL NULL

SECOND INTERCEPTION ORDER OF DECEMBER 10

Affidavit

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-5155

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GEORGE W. McGIRR, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

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That deponent has been informed by persons in a position to know, and whom he believes to be telling the truth, that one "Sid" and one "Matty", whose full names are unknown, and other persons whose names are unknown to informants and deponent, are engaged in the illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., and bearing the number Circle 5-5155.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-5155, he will be able to obtain information against the said "Sid" and "Matty" and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over the telephone instrument Circle 5-5155, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument bearing the number Circle 5-5155, located at premises 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) George W. McGirr

Sworn to before me this
10th day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

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Order

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-5155

Acting Lieutenant George W. McGirr, assigned to Borough Headquarters Squad, Manhattan West, of the Police Department of the City of New York, being now present before me and it appearing from his affidavit, sworn to on the 10th day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone Circle 5-5155, located at 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., and that the ends of justice will be best served by authorizing the interception of messages; it is

ORDERED, that the Police Commissioner of the City of New York or his duly authorized agents be, and they hereby are, authorized and empowered to intercept, listen to,

overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-5155, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events; and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be, and they hereby are, authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-5155, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 10th day of February 1947.

Dated: City, and County of New York,
December 10, 1946.

(signed) Samuel Null
Justice of the Supreme Court
of the State of New York.

SAMUEL NULL

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NEW YORK PENAL LAW

§1423. Injuring • • • telegraph, or other property.

A person who wilfully or maliciously displaces, removes, injures, or destroys:

• • •

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or who shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state • • •, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned • • • is punishable by imprisonment for not more than two years.

• • •

(*New York Laws 1892, c. 372; id. 1911, c. 316*)

Since the filing of this memorandum, an additional section has been added to the Penal Law (L. 1949, c. 519):

§552-a. Wire tapping instruments

A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for wire tapping or the interception of telephone communications under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for wire tapping or interception of telephone communications, or knowing the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he shall be guilty of a felony.

NEW YORK CONSTITUTIONAL CONVENTION

A New York State Constitutional Convention was convened at the State Capitol at Albany on April 5, 1938, to make recommendations for proposed changes in the existing State Constitution (convention 3-4). On June 15 the chairman of the Committee on the Bill of Rights introduced a proposal to embody within the Constitution a search and seizure guarantee modeled on the federal Bill of Rights, and to set up the instant telephone interception provision (convention 392, see *id.* 380, 424, 472, 536-537). The proposal was referred for further consideration to the Committee of the Whole, and during the following weeks went through more of the required parliamentary steps (convention 389, see *id.* 406, 589, 593-603).

Another proposal, introduced by John J. Dunnigan and also reported out by the Committee on the Bill of Rights, embodied the basic committee proposal on searches and interceptions (convention 90, 386, 472-473). It would, however, have engrafted on it a provision against the reception of illegally-obtained evidence which, applied to interceptions, would have barred all not made in accordance with the required procedure (convention 406-407, 408, 415). Various statements were read which had been made by State officials interested in the subject, and there was full debate (convention 358-568 *passim*, see *id.* 336-340, 368-374).

The following delegates to the Convention, pointing in the main to the threat of organized urban crime, spoke in support of maintaining the committee proposal substantially in the form originally introduced: Harold Riegelman, convention 414-417, Harry E. Lewis 424-432, Abbot Low Moffat 449-450, H. Duane Bruce 450-455, Riley H. Heath 466-469, Philip J. McCook 478-481, William F. Love 481-483, Francis Martin 497-503, O. Byron Brewster 507-508, Thomas J. Curran 522-529, George F. McNaughton 533-

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534, Henry Hirschberg 534-544, Alfred E. Smith 544-546, William S. Bennet 554-558, Edgar J. Nathan, Jr. 558-559, Hamilton Fish, Jr. 562-565, James P. Hill 565-568 (see convention 26-29).

The following spoke in favor of the rival Dunnigan proposal: John J. Dunnigan, convention 358-367, 407-408, Frank E. Johnson 375-377, 408-412, Lithgow Osborne 412-414, Edward Weinfeld 417-424, Chauncey M. Hooper 444-449, George R. Fearon 455-466, Thomas B. Dyett 503-507, Max D. Steuer 508-522, Francis D. McGarey 529-533, Philip Halpern 546-554, Robert F. Wagner 559-562, 818-820 (see convention 26-29).

The Dunnigan amendment failed, and a number of other amendments were considered (convention 573-589, see *id.* 572). The committee proposal, without material alteration, was eventually adopted by the Convention (827). On August 26, along with various other constitutional proposals, it was referred by the Convention to the electors of the State for their rejection or approval (convention documents No. 15, pp. 15-16; No. 16, p. 6; No. 17, p. 1; No. 18, pp. 1-2). It was approved by the voters at a general election held on November 8, 1938 [New York Consol. Laws, Book 2 (McKinney, 1939) p. 98; see convention document No. 17, p. 1].

ARTICLE I OF THE NEW YORK CONSTITUTION

§12. [*Security against* • • • *interceptions*]*

• • •

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

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* For the search and seizure part of this Section, see A4.

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NEW YORK CODE OF CRIMINAL PROCEDURE

§813-a. Ex parte order for interception

An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. (*New York Laws 1942, c. 924*)

DEBATES ON FEDERAL ACT

On June 15, 1938, in the House, Representative O'Connor of New York, in a debate on a bill to amend the Federal Communications Act in order to allow interceptions by federal officers, stated [*83 Cong. Rec. (1938) 9453, see S. 3756 (75th Cong. 3d Sess. 1938)*]:

Mr. O'Connor of New York. Will the gentleman yield?

Mr. Quinn. I yield to the gentleman from New York.

Mr. O'Connor of New York. It is so fundamental that it is one of the leading issues in the New York State constitutional convention, which is considering wire tapping and the use of information so obtained in any court. There are two schools of thought, the Federal school which prohibits it, and in some States they permit it. Mr. Justice Holmes had something to say about this dirty work, I think he called it, or dirty business. The Federal courts have almost invariably prohibited the use of evidence obtained by wire tapping. I do not know of a greater fundamental question that involves the liberties of our citizens. The gentleman says this may be done.

[Here the gavel fell.]

Mr. Fish. Mr. Speaker, I ask unanimous consent that the time of the gentleman from Pennsylvania [Mr. Quinn] may be extended 5 additional minutes.

The Speaker. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. O'Connor of New York. As I say, there is gathered in the State of New York now 168 of the leading citizens, including lawyers and judges, who are working on this problem. Editorials have been written on it. As

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I said, there are two schools of thought. The New York Times yesterday had an editorial to the effect a provision like this should not pass.

The gentleman stated that the head of a Department could authorize this wire tapping. The suggestion in New York, as made by the strong advocates of a similar bill is, there should be a court order in every instance; but the other school says that even with a court order wire tapping should not be permitted because it is an interference. I am not talking about gangsters nor am I defending gangsters. The head of a Department may determine that a distinguished citizen is about to commit a crime and tap his wires. I do not think a big question like this ought to be passed at this stage of the Congress.

See also 83 Cong. Rec. (1938) 4344, 6718 [S. Rept. 1790 (75th Cong. 3d Sess. 1938)], 7053-7054, 7213, 8581 [H. Rept. 2656 (75th Cong. 3d Sess. 1938)], 8831, 9452-9453, 9635-9637; H. R. 9898 (75th Cong. 3d Sess. 1938), 83 Cong. Rec. (1938) 3535.

On August 6, 1940, during debate on another proposed measure to allow such interceptions, Representatives Schafer of Wisconsin, Celler of New York and Robsion of Kentucky, spoke [86 Cong. Rec. (1940) 9948-9949, see H. J. Res. 571 (76th Cong. 3d Sess. 1940)]:

Mr. Schafer of Wisconsin. Under the law of the State of New York tapping telephone wires is a criminal offense, with a penalty, and I quote, "not to exceed 2 years imprisonment." The gentleman comes from the State of New York. Does he maintain that under this bill this Congress can grant authority to any Federal agency to willfully violate the law of the State of New York which provides a penalty of 2 years in the penitentiary for a violation of it?

Mr. Celler. I am very glad that the gentleman has asked that question because the gentleman is not conversant with the law in the State of New York. Last year we had a constitutional convention in the State of New York and our constitution was revised and changed, and in respect to wire tapping it reads as follows (sec. 12, par. 2, adopted Nov. 8, 1938):

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted, and the purpose thereof.

In other words, under the Constitution of the State of New York, wire tapping is now permitted in the State of New York for the interception and frustration of any kind of crime, no matter what it may be. All that we ask in the pending bill is the right to have wire tapping in the interest of national defense, in the specific cases mentioned; so that we have this anomalous situation: A New York City detective, or a detective upstate in New York can tap wires by getting an ex parte order from the court,

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whereas the F. B. I. agent in New York cannot do a darn thing relative to tracking down those Nazi agents, these Communists, and these other agents of foreign powers. That is an anomalous situation which we are trying to avoid by this bill.

• • •

Mr. Robsion of Kentucky: So that the bill before us more nearly safeguards the rights of the people from wire tapping than does the constitution of New York.

Mr. Celler. I thoroughly agree with the gentleman.

See also 86 Cong. Rec. (1940) 8219, 8300 [H. Rept. 2574 (76th Cong. 3d Sess. 1940)], 9943-9948 [H. Res. 537 (76th Cong. 3d Sess. 1940)], 9948-9952, 9964; H. J. Res. 553 (76th Cong. 3d Sess. 1940), 86 Cong. Rec (1940) 6955, A1471-1472.

On May 26, 1942, Representative Celler of New York stated [*88 Cong. Rec. (1942) 4599, see H. J. Res. 310 (77th Cong. 2d Sess. 1942)*]:

We could not conjure up any other limitations. We put every possible safeguard in the bill to protect the rights of all parties, all citizens anywhere, everywhere in the United States. We feel that in the interest of the war effort, we should have this legislation. My State of New York, for example, has in its constitution the right to tap wires, and to use the evidence obtained in the detection of crimes. If we do not pass this legislation, we will have an anomalous situation. For example, a New York City policeman could tap a wire, whereas an F.B.I. agent could not, and in addition use the evidence obtained thereby. That is a ridiculous situation and we must cure that [.]

See also 88 Cong. Rec. (1942) 3964, 4029 [H. Rept. 2079 (77th Cong. 2d Sess. 1942)], 4594-4602, 4605; H. R. 6919 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 3470; H. J. Res. 273 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 758, A288-289; H. J. Res. 283 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 1234; H. J. Res. 304 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 3626, 3688 [H. Rept. 2048 (77th Cong. 2d Sess. 1942)], 3930.

Cf. H. R. 4228 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 2762, 2849 [H. Rept. 358 (77th Cong. 1st Sess. 1941)], 5760-5767 [H. Res. 222 (77th Cong. 1st Sess. 1941)], 5768-5775, 5777-5781, 5786-5794, A2157-2158, A3204, A3293-3294; H. R. 2266 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 182; H. R. 3099 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 679.

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RESOLUTION FOR INVESTIGATION

On February 1, 1940, Senator Green of Rhode Island introduced the following resolution in the United States Senate [86 Cong. Rec. (1940) 889-890, S. Res. 224 (76th Cong. 3d Sess. 1940)]:

Resolved, That the Committee on Interstate Commerce is authorized and directed to make a full and complete investigation of alleged instances of (1) interception, by means of wire tapping or otherwise, of wire communications to or from officials and employees of the Federal, State, and local governments, and (2) installation of dictographs or similar devices for the purpose of listening to or recording conversations participated in by such officials and employees. The committee shall report to the Senate as soon as practicable the results of its investigation, together with its recommendation for the enactment of any remedial legislation it may deem necessary.

For the purposes of this resolution the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions and recesses of the Senate in the Seventy-sixth and succeeding Congresses, to employ and to call upon the executive departments for clerical and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, to take such testimony, and to make such expenditures as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The expenses of the committee, which shall not exceed $15,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

REPORT AND AUTHORIZATION

On March 12 Senator Wheeler of Montana filed a report of the Senate Committee on Interstate Commerce approving the investigation. So far as here relevant, the report stated [S. Rept. No. 1304 (76th Cong. 3d Sess. 1940) at pp. 1, 7; see 86 Cong. Rec. (1940) 2693]:

The Senate Committee on Interstate Commerce to whom was referred the resolution (S. Res. 224) having considered the same, report thereon with the recommendations that it pass with an amendment [to increase the appropriation for expenses].

The resolution (S. Res. 224) proposes an investigation by the Senate Committee on Interstate Commerce of wire tapping and the use of dictographs and similar devices for listening to or recording conversations. While the resolution deals with the use of such methods against employees and officials of Federal, State, and local governments, it might appropriately be broadened to cover the use of such methods against any person, official or non-official. The proposed investigation is sufficiently broad to deal with wire tapping and use of dictographs by governmental or private persons, by governmental or private detective bureaus, a political party in power or a political party out of power, and whether employed for purposes of political or business advantage, in industrial espionage against a commercial competitor or against labor unions, or in the detection of crime.

• • •

Senate Resolution 224, which is recommended for passage, will provide a congressional inquiry useful to ascertain, in the words of Senator Norris to the Attorney General on the subject of current demands for a more

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sweeping inquiry into other phases of "dirty business" by Government police, "whether the legitimate rights and liberties of any of our people have been frustrated and denied," and will be useful to prevent activities whether by public or private spy systems which "are going to bring into disrepute the methods of our entire system of jurisprudence," and will help to insure that "the activities of its officials and officers [are] kept within the bounds of civilized government."

The importance of this investigation is great. Whether it be the use of wire-tapping or dictographs by those seeking to detect crime, or their use by those seeking to commit crime, the effect on our judicial and social systems is far-reaching. As is natural, hitherto the courts have had before them cases of the former type, but cases of the latter sort are bound to come before them, especially if adequate legislation is enacted to deal with this evil. The fundamental principles have already been enunciated by the courts, and legislation that may be proposed after an investigation conducted under the terms of this resolution should contribute largely to that end.

The resolution, without the proposed committee amendment to increase the appropriation, was adopted by the Senate on March 20 [*86 Cong. Rec.* (*1940*) *3116*]. *A special subcommittee of the Committee on Interstate Commerce, consisting of Senators Tom Stewart of Tennessee* (*chairman*), *Sherman Minton of Indiana, Harry H. Schwartz of Wyoming, Wallace H. White, Jr., of Maine, and Chan Gurney of South Dakota, was appointed to conduct the investigation* (*hearing 1-2*).

See also 86 Cong. Rec. (*1940*) *13254-13255, tabling a subsequent amendment to change the stated scope of investigation* [*S. Res. 323* (*76th Cong. 3d Sess. 1940*)].

SUBCOMMITTEE HEARINGS

On May 28, 1940, Matthew W. Goring, a former Special Assistant to the Attorney General of Rhode Island, testified before the United States Senate subcommittee which was charged with the investigation of State telephone interceptions (hearing 240-241):

Mr. Maloney [counsel to committee]. In the course of your discussion with Mr. Tyng [Assistant District Attorney of New York County] was the question of wire tapping brought up?

Mr. Goring. Oh, yes.

Mr. Maloney. Did you discuss that with Mr. Tyng?

Mr. Goring. I did.

Mr. Maloney. Did you tell him you contemplated doing some wire tapping in Rhode Island?

Mr. Goring. I didn't. In fact I didn't contemplate doing wire tapping in Rhode Island.

Mr. Maloney. Who mentioned wire tapping? Mr. Tyng?

Mr. Goring. I don't recall that.

The Chairman [Senator Stewart of Tennessee]. Is that an approved method of procuring evidence in New York?

Mr. Goring. Well, I was told by Mr. Tyng that it was a regular practice in investigations conducted by the office of the New York district attorney and that it was sanctified by order of the judge of a New York court of record.

The Chairman. Sanctified?

Mr. Goring. I selected that term with some care, but I don't want to be held down to it.

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Mr. Maloney. Mr. Goring, you have reference to the fact under the New York State Constitution it is permissible to obtain an order from the court of record in New York State by which order you are permitted to tap a telephone where there is evidence submitted to the court that a crime is being committed or the telephone is being used in the commission of a crime. That is what you are referring to when you say it has been sanctified?

Mr. Goring. I am referring to the practice that obtains in New York for obtaining an order from the court—from a court of record.

I am not referring to the assertions made which the judges—

The Chairman (interposing). Is there a statute in New York covering that?

Mr. Goring. I believe there is legislation or constitutional authority for that particular practice in New York, the theory being, if I get it right, that it is treated analogous to a search warrant.

I was informed by Mr. Tyng at the time, I think I am correct in saying, there was no case which had been prosecuted by the New York district attorney's office, or the office of the New York county attorney, in which evidence of conversations heard over a wire tap had been introduced.

Mr. Tyng and I both discussed that phase of the matter.

The Chairman. Just a moment. You are discussing the admissibility of certain evidence?

Mr. Goring. Discussing the application made by the law-enforcement authority of evidence obtained that way.

In other words, they did not introduce evidence of a conversation between A and B.

The Chairman. You mean to say the purpose of this statute, and we are interested in learning what the laws on

this subject might be, that the New York statute makes evidence so obtained admissible in court if it is obtained in the manner prescribed?

Mr. Goring. I think the substantial language of the constitutional provision is that no evidence obtained by wire tapping shall be admissible—

The Chairman (interposing). You do not mean the Constitution.

Mr. Maloney. Yes; it was adopted at a constitutional convention last year. It went into effect in 1939 and was adopted in 1938.

The Chairman. What was the provision?

Mr. Goring. Substantially that no evidence shall be admissible unless first authority to make the tap is obtained from a justice of a court of record. So, that in effect it makes such evidence with such procedural conditions admissible.

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On November 20 Mr. John J. Robinson of the New York Telephone Company testified before the committee (hearing 648-650):

The Chairman [Senator Stewart]. In New York State there is, as I understand it, a law which permits wire tapping under certain conditions.

Mr. Robinson. That is correct, Senator.

The Chairman. When a wire tap might be made under this statute in New York State, is your company notified and do you collaborate?

Mr. Robinson. I can explain that to you, Senator.

The Chairman. Yes.

Mr. Robinson. On January 1939 a law was passed on that in New York, and it went into effect; as a matter of fact it was passed previously, as I recall, which made wire tapping legal under certain circumstances.

The Chairman. There was a constitutional amendment.

Mr. Robinson. Yes. And a police officer may go into court and make application to a judge for permission to tap wires under certain circumstances.

When the order is granted, a copy is presented to the telephone company, whereupon, the telephone company will request—rather, it is requested to furnish the cable and pairs for the particular line involved. Having gotten that, I take it, the police go out and make the physical tap.

The Chairman. They make the application to the telephone company?

Mr. Robinson. To the court first, and the copy of it, a copy of the order is served on us.

The Chairman. And they make application for certain apparatus?

Mr. Robinson. Not apparatus, but certain information as cable numbers and pairs and terminal locations.

The Chairman. So that they may tap the correct wire?

Mr. Robinson. Yes.

The Chairman. Has this been carried on quite a lot in New York State?

Mr. Robinson. I think, if I recall the figures correctly, speaking for Manhattan and the Bronx, since the law went into effect in January 1939, we have had 139 or 140 requests from the police department with these orders.

The Chairman. Within a period of about a year?

Mr. Robinson. About a year and a half.

The Chairman. You have had no requests this year, I imagine.

Mr. Robinson. Yes; I think this year they ran about, oh, I think, if my figures are correct, up to August 1, about 61.

The Chairman. Do you care to express any opinion or statement about wire tapping? What do you think about the wire-tapping law?

We should like to know whether you think it is a good thing or a proper thing under certain circumstances, or conditions, to aid in the tracing of a crime, certain types and character of crime.

Mr. Robinson. Well, I think perhaps under certain circumstances, if handled by the properly constituted authorities, it might serve a useful purpose.

However, I am a great believer of the fact it can be terribly abused.

The Chairman. What do you think about the New York statute, or rather, the constitutional amendment, I believe it is—

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Mr. Robinson. That was so designed for the purpose of doing good, but whether it has or not, I am in no position to say.

The Chairman. What do you think about it as an effective means to reach crime?

Mr. Robinson. As I said, under certain circumstances, it has—and if handled by the properly constituted authorities and handled in the right hands, it might do some good.

The Chairman. In New York State it is required, is it not, that certain authorities handle it, the police authorities?

Mr. Robinson. I don't know just how tight the routine is and how easy to get those orders. I have never made application. It may be very easy, and if it is, the darn thing could be abused.

The Chairman. There is nothing in the law that gives the telephone company the right to make an objection to the tap. You must, as a routine matter, cooperate?

Mr. Robinson. I don't know. Not that I know of. We just have to give information.

The Chairman. Do you want to give an opinion as to how the New York statute works in New York?

Mr. Robinson. I don't know what result they have obtained.

The Chairman. You have learned more here about them than you knew before?

Mr. Robinson. I would not say that, but, answering your question, I haven't any knowledge whether the law has been effective along the lines they thought it might be. We only give the information. How the thing works physically, I don't know.

On November 20 Mr. Sol Gelb, an Assistant District Attorney in the New York County District Attorney's Office, testified before the committee (hearing 659-661):

The Chairman [Senator Stewart]. G-e-l-b.

Mr. Gelb, you have been for 5 years an assistant in charge of the prosecution of some criminal offenses all that period of time?

Mr. Gelb. Yes, sir.

The Chairman. During that time you have not had in New York State, as I am informed, any law giving you the right to tap wires and intercept telephone conversations except with the coming of the constitutional amendment which was adopted in November 1938. That went into effect, as I recall, November 1939. Then you had no legal method of wire tapping except under that statute or constitutional provision?

Mr. Gelb. No, Senator. Before that time the statute had provided any unauthorized tapping of a wire was illegal.

The Chairman. There was a statute prior to the constitutional amendment?

Mr. Gelb. Yes. For example, the police department of New York used to tap wires and nobody—at least, never was any prosecution brought against the police department.

The Chairman. Can you give us briefly the history of your constitutional amendment?

Why was it made a constitutional amendment rather than the old law or statute amended?

Mr. Gelb. The delegates felt the wire tapping should be somewhat curbed. They felt that reasons should be given before the wires should be tapped. So they amended

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it today so that somebody will put himself on record and state why a certain wire should be tapped, and a supreme court justice will authorize tapping of that wire.

The Chairman. And then, as I understand the law, you have now, it requires that you appear before a court. Tell me what it provides?

Mr. Gelb. It provides before a wire can be tapped—and only by a law enforcement officer—an order must be obtained from a justice and a court of record and the order must be obtained on an affidavit made by the law enforcement official seeking to tap that wire.

The Chairman. In somewhat the methods used to prosecute a search warrant.

Mr. Gelb. That's right. Some cause must be shown.

The Chairman. And that is on an affidavit and petition jointly presented to a court of record—to the judge of the court of record.

Mr. Gelb. Yes, sir.

The Chairman. So as to give him discretion.

Mr. Gelb. Yes, sir.

The Chairman. Does the law state that must appear in the affidavit or petition?

Mr. Gelb. No, sir. The law does not state "cause shown."

The Chairman. Cause shown as to what—the law may be violated?

Mr. Gelb. I could not tell you offhand. I am not familiar with the wording, but I know you must give reason.

The precise wording I don't recall but in effect you have got to show some good cause. I think it is more definitive than that.

The Chairman. You are familiar with our statute?

Mr. Gelb. Yes.

The Chairman. Which was passed in 1934 as an amendment to the Federal Communications Law. We are interested in recommending to the Congress what should be done about this statute, whether it should be repealed, modified, strengthened, or whether anything should be done about it.

As a law-enforcement official and as a prosecutor, what is your opinion about the value of this type of evidence, in the first place, that might be obtained by tapping wires and inserting dictaphones, which is included in the law also?

What is your opinion of the value of that type of evidence in running down crime?

Mr. Gelb. I haven't given very much thought to it, except to absorb a record in working on various criminal prosecutions. I have found that wire-tapping serves a limited useful purpose, very limited. I know in prosecutions rarely, if ever, have we used a wire tap as evidence. I don't recall its use. The limited usefulness of wire tapping is in cases where an extensive investigation is started.

The Chairman. And you can procure leads.

Mr. Gelb. Into a racket. The wire tapping will reveal the picture of the operations of an extensive racket enterprise much more quickly and with much better clarity than would an investigation conducted over a period of months. That is the usefulness I have found in wire tapping. You can investigate a racket and find in 2 weeks you can get the set-up very clearly.

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The Chairman. You get leads?

Mr. Gelb. You can find out what roles the principals play and examine witnesses more intelligently on the basis of the information you obtain at the inception of the investigation. It might take months of hard work to obtain the same type of information otherwise.

It probably could be obtained, but that is what I find.

The Chairman. In the year and a half, nearly 2 years now, that the law has been effective in New York State, I believe Mr. Robinson of the Telephone Co. said an employee of his had 150 requests made of the Telephone Co. to cooperate on orders of the court directing wires be tapped.

That is probably a rather large number of cases even in New York City, it seems to me. I don't know whether I am correct about that or not. At the same time the point I am making is that it appears to have been used a good deal.

Mr. Gelb. There are *15* [five] counties in New York [City] and over *1,800* [18,000] police. One would gather that the only activities that were carried on by the police that may constitute the use of wire taps is by Captain Dowd and District Attorney Dewey's office. There were *1,800* police and wire tappers working for the police department in the city of New York, which have nothing to do with the district attorney's office.

And why there were requests for 150 I cannot tell you. I can only speak for our office.

The Chairman. Do you know of any instances where court orders granting the permission to tap wires has been abused?

Mr. Gelb. I personally don't.

On December 11 Detective Kenneth Ryan of the New York City Police Department testified before the committee (hearing 817-819):

The Chairman [Senator Stewart]. You mean you have gotten valuable and worthwhile leads?

Mr. Ryan. Not so much leads. In New York we have five boroughs. We have our hands full to tail a man from Manhattan to Brooklyn. If we know where they congregate it saves quite a bit of work, of actually tailing them. If we lose them, we will be able to pick them up at that particular spot and we know just about when a job is coming off. It really helps us very much that way.

The Chairman. You mean when a job is coming off, what particular crime are they planning to commit?

Mr. Ryan. In this particular case I am referring to, it was a stick-up on Thirtieth Street, a fur shop. It was 3 months before.

The Chairman. That gave you a lead.

Mr. Ryan. It sure did.

The Chairman. It gives you a lead to the commission of the crime.

Mr. Ryan. We knew it was going to happen, but we didn't capitalize until we realized what was going to happen.

The Chairman. Do you think as a police officer you would have the—would you advocate the modification or lightening up of the present laws?

Mr. Ryan. The way it stands now, with a court order, I think it is fine.

The Chairman. That is confined to New York State. You are speaking of your own State?

Mr. Ryan. That is right, because you can go to the county judge; if he will sign a court order, you can use it.

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The Chairman. Somewhat the same procedure that you follow when you want a search warrant?

Mr. Ryan. Somewhat; yes.

The Chairman. You would not advocate the free use of wire tapping and placing dictographs without some restraint or restriction?

Mr. Ryan. There must be some restraint and restriction.

The Chairman. Would you confine it solely to law-enforcement officials, police departments, and sheriffs?

Mr. Ryan. I think I would, because there would be nobody else that would have use for them.

The Chairman. There might be others that would use them.

Mr. Ryan. That is perfectly true, as far as wire tapping is concerned. There may be a case now and then, or occasions, where dictograph recordings of conferences—we will say conferences over a telephone—where you might want to make a record if you had a conversation with somebody on business in England and you would want to refer back to some point and you would not want to call England again to verify it.

Outside of that, or any law-enforcement agency, I could not see any reason why anybody else would want to tap a wire.

Mr. Maloney. No other good reason.

Mr. Ryan. No other good reason.

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The Chairman. Would you recommend restriction in the use of the dictograph and wire taps to any particular class of crime?

The Attorney General for the United States, I believe, suggested in cases of espionage, sabotage, and kidnapping—those three. The Government officials tell us they think it is all right to use in any of those three.

Mr. Ryan. Here is a different situation. Homicides, we have narcotics—narcotic cases, and we have had success in every one. I can enumerate 15 or 20 classifications of crime in which we have had success over the wire; that is, from the information received.

The Chairman. What would you think would be the effect on the underworld, in general, if the use was strictly prohibited, that the police department would not, or could not, lawfully use them?

Mr. Ryan. They would get along pretty well in a short time. It would be hard.

The Chairman. You think that would increase crime?

Mr. Ryan. I would not say necessarily increase it. It would facilitate crime. There would be no question about that.

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Mr. Maloney. Mr. Ryan, it is the practice in New York State at the present time to secure an order from the judge of the supreme court?

Mr. Ryan. Yes; an affidavit is made up.

Mr. Maloney. And the judge signs it?

Mr. Ryan. And the judge signs it.

Mr. Maloney. That is done pursuant to an amendment to the constitution of the State?

Mr. Ryan. That is true.

Mr. Maloney. As far as you know, it is a practice of the police department to conform to that law at all times?

Mr. Ryan. Yes.

Mr. Maloney. You have no knowledge of where that law has been violated, and the police have gone ahead and tapped wires without getting an order?

Mr. Ryan. No, sir; as far as I know.

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Law and Cases

In *Olmstead* v. *United States,* 277 U. S. 438, 467-468, involving the legality of evidence secured through interceptions, the Court held such evidence admissible at common law.

In *Goldman* v. *United States,* 316 U. S. 129, 135-136, involving the analogous question of evidence secured by detectaphone, the Court ruled it similarly admissible.

In *Leon* v. *State* (1942) 180 Md. 279, 284, 23 Atl. (2d) 706, 709 [*cert. den. sub nom. Neal* v. *Maryland,* 316 U. S. 680] involving the intended scope of the present federal act, the court held it inapplicable to State courts.

Cf. People v. *Kelley* (1942) 122 Pac. (2d) 655, 658-660 (not officially reported), aff'd 22 Cal. (2d) 169, 137 Pac. (2d) 1, appeal dism. 320 U. S. 715; *People* v. *Vertlieb* (1943) 22 Cal. (2d) 193, 195-196, 137 Pac. (2d) 437, 438; *People* v. *Barnhart* (1944) 66 Cal. App. (2d) 714, 722-723, 153 Pac. (2d) 214, 219; *People* v. *Onofrio* (1944) 65 Cal. App. (2d) 584, 585, 588, 151 Pac. (2d) 158, 159, 160-161; *Rowan* v. *State* (1939) 175 Md. 547, 555-556, 559-560, 3 Atl. (2d) 753, 756, 758; *Hitzelberger* v. *State* (1938) 174 Md. 152, 168, 197 Atl. 605, 612; *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15, 17-18, 68 N. E. (2d) 854, 855. See, also, *Olmstead* case, 277 U. S. at p. 469.

CASES DISTINGUISHED

In *Nardone* v. *United States*, 302 U. S. 379 (Stemmer pp. 4, 5, 6, 8, Krakower pp. 3, 5, 10, 13), the Court declared that the present act regulated the official morality of federal officers.

In *Weiss* v. *United States*, 308 U. S. 321 (Stemmer pp. 4, 6, 7, Krakower pp. 5, 10, 14) the Court held that the act barred all intercepted evidence from federal courts.

None of the cases upon which petitioners rely (Stemmer pp. 4-8, Krakower pp. 3-5, 10-14) held it applicable to State courts.